1955

fulltext_url

Utah Supreme Court

George K. Fadel; Attorneys for Appellant;

Case No. 8419

IN THE SUPREME COURT

of the

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

—vs.—

WILBUR J. STITES,

Defendant,

BRIEF OF APPELLANT

GEORGE K. FADEL
Attorney for Appellant

CARR'S, 55 3676, BOUNTIFUL, UTAH

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

—vs.—

WILBUR J. STITES,

Defendant,

Appellant's Brief

Case No. 8419

George K. Fadel,
Attorney for Appellant

STATEMENT OF FACTS

This is an appeal by the defendant, Wilbur J. Stites, from a verdict and judgment entered in the District Court for Cache County, State of Utah, finding and adjudging the defendant guilty of misapplying money of a corporation and sentencing defendant to an indeterminate term of not less than one nor more than ten years in the State Prison. The defendant will be hereinafter referred to as the appellant, and the plaintiff will be hereinafter referred to as the respondent.

The appellant was charged by information as follows:

> "WILBUR J. STITES, alias Webb Stites and alias W. J. Stites, having heretofore been duly committed to this court by Jesse P. Rich, a Committing Magistrate within and for the County of Cache, State of Utah to answer to this charge, is accused by Curtis E. Calderwood, District Attorney of the First Judicial District of the State of Utah by this Information of the crime of misapplying money of a corporation, a felony as follows:
>
> "That on or about the 3rd day of December, 1954 at the County of Cache, State of Utah, the said defendant did then and there as a director and an officer of a corporation of Valley Motor Company, a Utah Corporation wilfully, unlawfully and feloniously misapply money of the said corporation in the amount of $2,000.00 which he had received from Robert S. Budge which was the property of the said corporation, contrary to the provisions of the statute of the State aforesaid in such cases made and provided, and against the peace and dignity of the State of Utah. Dated this 14th day of June, 1955."

The appellant filed a motion to quash for the reason alleged that the information did not charge the defendant with the commission of an offense (R. 2), which motion was denied by the court. Thereupon the appellant entered a plea of "not guilty" And the cause was set for jury trial July 20, 1955.

The jury was duly selected and the trial began on July 20, 1955.

All of the evidence presented at the trial was offered by witnesses called by the respondent, excepting the testimony of Attorney George Preston, called by the appellant.

BACKGROUND OF CORPORATE ORGANIZATION AND CONTROL

The Valley Motor Company was issued a certificate of incorporation by the State of Utah, January 8, 1954 (Pl Exhibit No. 2). The total authorized capital stock of the corporation was 1000 shares at a par value of $100.00 each of which the incorporators subscribed as follows (Pl Exhibit No. 3):

Wilbur J. Stites	596 shares
Gene Smart	1 share
Dean J. Rogers	1 share
Seth S. Allen	1 share
Zachary T. Champlin	1 share

All of the aforesaid incorporators except, Zachary T. Champlin, were named in the Articles of Incorporation as the first board of directors, with the appellant, Wilbur J. Stites named as president, Dean Rogers as Vice President and Gene Smart as Secretary-Treasurer (Pl Exhibit No. 3).

The incorporators and Board of Directors each held one meeting, both held on January 18, 1954, at the office of Valley Motor Company, Logan, Utah, the incorporator's meeting being at 8:00 o'clock p.m. and the board meeting at 9:00 o'clock p.m. (R. 49). No other meetings were held during the year 1954 (R. 38 and 39).

At these meetings, Mr. Champlin, the attorney who drafted the articles of incorporation, presented certain matters to the incorporators and directors in the form of recommended by-laws (R. 42 and 43) but the minutes as subsequently typed were never approved by the Board nor were they ever signed (R. 43) and the original notes taken at the meeting could not be found (R. 50). The purported minutes were offered by the respondent to show that the First National Bank of Logan was the bank at which company funds were to be deposited, but Mr. Champlin admitted this was done because the bank required a resolution authorizing the depository (R. 42). Upon objection of appellant to introduction of the purported minutes, a discussion before the jury transpired between the trial judge and counsel for the parties (R. 56 and 57) and the judge sustained the objection upon admission of the appellant that the First National Bank was desigated as *a* depository, though not a mandatorily exclusive depository. However, subsequently (R. 120) the respondent again offered the minutes in evidence and the court admitted the same over objection of appellant with the following comment: (R. 120)

> "Under the circumstances the book is received, but, gentlemen, the court is not characterizing the book as a stockholders' book or minute book. It's some papers with writing on them, unsigned. So for what it's worth, it's received."

Mr. Champlin, one of the incorporators, testified that he paid $10.00 on the one share to which he had subscribed (R. 43) and added that he paid the remainder in services, although he never did bill the company for such services and had been paid $390.00 cash (R. 29) and had never filed any claim for more; that he signed as an incorporator because the law requires five incorporators; that the incorporators other than Stites subscribed to one share each (R. 44 and 45).

The corporation was organized to be run by appellant (R. 133). Appellant and Wayne Craw, Jay Howell and Clair Lundberg each advanced $6,000.00 to the corporation to commence business and no other cash was advanced by any other parties (R. 135). Howell (R. 133), Craw (R. 114) and Lundberg (R. 106) advanced said $6,000.00 each as a loan and were creditors of the corporation; however, they had a side agreement with appellant that Craw, Howell and Lundberg would be employed by the company at a fixed salary of $500.00 per month, each, and that Stites would draw a higher salary and make equalization payments on the side to the other three from Stites own salary (Howell R. 104) (Craw R. 113 and 114). The board of Directors named in the articles, as such, did not undertake to direct the affairs of the company, and in fact Rogers and Allen knew very little, if anything about the automobile business, and the management and direction of the company was left solely to appellant (Lundberg R. 137 line 13; Britzell R. 87).

In addition to the side payments to Lundberg, Craw and Howell, the appellant was to make payments from his personal account after drawings from the corporation, upon a $6,000.00 note to Gene Smart (R. 87-88) and upon a $25,000 note to W. W. Lundberg for auto parts (R. 135 and 136).

TRANSACTION WHICH WAS SUBJECT OF CHARGE

Dr. Robert S. Budge testified that on December 3, 1954 he purchased a Buick Riviera, 1955, from Valley Motor Company (R. 62). Dr. Budge traded a 1951 Studebaker for the Buick and agreed to pay $2000.00 in cash additional. This $2000.00 additional cash was paid by check as appears from Plaintiff's Exhibit #4, substantially, as follows:

FIRST SECURITY BANK OF UTAH

Smithfield, Utah, 2 Dec — 1954

Pay to the order of WEBB STITES $2,000.00

Two Thousand and No/100 ..... Dollars

s/ Robert S. Budge

This check was given by Dr. Budge to appellant (R. 63). The indorsement on the back of the check was: "Webb Stites for deposit only" (Pl Exhibit 4), and was deposited to the personal account of appellant in the Logan Branch of First Security Bank. (R. 67-68).

REVIEW OF EVIDENCE OF PURPORTED MISAPPLICATION

Don Britzell, bookkeeper and office manager of Valley Motor Co. testified that he was employed by "Webb Stites and Valley Motor Company" (R. 69); that the Buick automobile purchased by Budge was the property of Valley Motor Co., and that the records and books which Britzell kept showed a balance due and owing to Valley Motor Co. of $2000.00 by Dr. Budge (R. 73-76); that there is no record of the receipt of $2000.00 by Valley Motor Co. from Dr. Budge (R. 77). Under cross examination (R. 79) Britzell admitted that the records would show nothing other than

what was placed in the records by Britzell or the office girl under Britzell's direction. Britzell, when first confronted with the matter as to whether Britzell had been directed by appellant to charge the $2000.00 against appellant's account, hedged as follows (R. 79-81):

> Q Now, Mr. Britzell, don't you recall that Mr. Stites told you to charge that $2,000 to his account?
>
> A Not directly.
>
> Q But you remember a discussion of that, don't you?
>
> A I do. He might have been —
>
> Q But you didn't charge it to his account, did you?
>
> A No.
>
> Q And you still haven't done so?
>
> A I couldn't charge it to his account as long as there was an outstanding contract to Robert Budge.
>
> Q Didn't he tell you to charge it to his account?
>
> A Not that I remember of directly, no.
>
> Q Haven't you told some other persons that's what he told you to do?
>
> A I have not.
>
> Q You haven't told anybody?
>
> A Not that he told me to charge it directly to him.
>
> Q Have you discussed this matter with the receiver.
>
> A With the receiver?
>
> Q Yes.
>
> A No.
>
> Q Well, what do you recall he told you?
>
> A He just said, "Charge it." That's all he said, as I remember. Of course, we were doing a lot of other things that same evening, and he might have meant charge it to him.
>
> Q You don't know what he meant?
>
> A I don't really, no.

Q But you do remember his saying to charge it?

A That's right.

Q And you don't remember telling some other people that he had told you to charge it to his account?

A No.

Q But you know it's likely that that's what he intended to do, don't you?

A He may have done.

MR. CALDERWOOD: I object to that as a conclusion of the witness, and I object to the form of the question.

THE COURT: On cross examination it's all right. I'll take the answer.

Q Is that right?

A It could be, yes.

Q Now there had been a number of charges made to the account of Webb Stites on his personal account. He had an account in the files just like this didn't he?

A At times.

Q And you made various charges to his account there, didn't you?

A I did.

Q And some of them were in connection with automobiles, weren't they?

A They were.

Q So that there were other transactions that were charged to his account that was coming to the business; is that right?

A That's right.

Q And there were some checks that were made to his account deposited to his account; he paid some company business by his own checks; isn't that right?

A Indirectly, yes.

Q But he did pay them?

A Yes.

Q And there were some payments being made to persons for parts and so forth for the benefit of the company that were paid out of his personal account; isn't that right?

A Directly I would say yes.

Q And they remained as charges against his account, didn't they?

A That's right.

Q And at the end of the year or sometime, it was supposed to be reconciled; isn't that right?

A That's right.

Nevertheless, Britzell said he made the charge against Budge instead of Stites (R. 82 lines 14-19). Britzell was recalled (R. 153) and when asked when he was first informed to charge the $2,000.00 to Stites account, said he never knew it was to be charged to Stites account (R. 154 line 4); *however, when confronted with a memorandum in Britzell's own handwriting which showed the names on a number of contracts, Britzell admitted that he made a notation opposite the name of Robert Budge, "Charge Webb" (R.* 154). *On further redirect examination (R.* 154-155) *Britzell said he made the notation sometime in January,* 1955, *possibly on January* 10, 1955.

John Clay, a certified public accountant who was employed by respondent to examine the books of Valley Motor Company (R. 89) testified that the books showed the purchase of the car by Valley Motor Company and its subsequent sale to Robert Budge but the books did not show any credit of $2,000.00 to the Budge contract. Clay testified that from examination of the books it would apear that Stites owed the company by January 1955 the sum of

$70,017.15 (R. 92) and that as of October 1, 1955, it appeared from the books that Stites owed the company $45,849.76 (R. 95); however he admitted that he would not have credited Stites except for what the books showed. The cash receipts journal and many of the side payments from Stites account on company obligations would not be credited in the books (R. 96). Britzell, the bookkeeper, when shown the ledger sheet prepared by him showing the account of Stites up to October 16, admitted that the ledger sheet showed Stites owing only $17,000.00 as of October 16, 1954 (R. 118), as compared with the $45,849.76 figure which Clay found from examining the same books.

Over objection of appellant the court permitted Clair Lundberg (R. 99-104) and Wayne Craw (R. 109-111), employees of Valley Motor Company and persons with whom appellant was by agreement to divide his increased salary and allowances, to testify concerning a purported conversation which was said to have transpired in January 1955, in the upper room of Valley Motor Company between Clair Lundberg, Jay Howell, Wayne Craw and the appellant. Lundberg testified that he asked appellant "What did you do with the $2,000.00 from Bob Budge?" to which the appellant replied "I took that to cover another fictitious deal" (R. 104) and didn't know whether it was a fictitious deal being covered for the corporation or other persons (R. 107).

At the conclusion of the testimony of Wayne Craw (R. 120), the respondent rested and the appellant moved to dismiss the information for the reason that there had not been presented sufficient facts to prove the commission of the offense charged, which motion was argued at length by appellant and denied by the court.

Over objection of appellant the respondent was permitted to reopen its case (R. 122), and presented Jay Howell as a witness to testify, over objection of appellant, further concerning the conversation relative to the "fictitious deal" which was previously testified to by Clair Lundberg and Wayne Craw. The following transpired beginning at (R. 123 Line 30):

Q Was this conversation with Mr. Stites — where did it take place?

A In the upper room previously mentioned by Clair Lundberg and Wayne Craw.

Q And that's in the office of the Valley Motor Company?

A It's the upstairs of the Valley Motor Company.

Q And could you fix the date of that conversation?

A That would have been approximately four o'clock in the afternoon of the 19th of January, 1954.

Q Nineteen fifty-four?

A Yes. Or 1955, I beg your pardon.

Q Now with the conversation, did Mr. Stites discuss the matter with you freely and voluntarily?

A He did.

Q Was there any coercion or intimidation on your part?

A None.

Q Was anyone in the room armed?

A Yes.

Q. Who was armed?

A Mr. Stites.

Q Now without —

MR. FADEL: Now I object, your honor, and move that the answer be stricken, and I move at this time for a mistrial, and I think that this was completely planned by the district attorney and this witness, and I think that there was no foundation or any reason why that matter should have been mentioned here, and I move at this time for a new trial.

THE COURT: The answer is stricken and the jury is instructed to disregard it. I didn't know we were going to get an answer like that. The motion for a mistrial is denied and the motion for a new trial is denied. The jury will disregard the answer.

A discussion in chambers followed (R. 125-130), in which the court indicated that mere possession of a firearm is not proof in connection with misapplication of funds (R. 127), without a showing that the appellant was summoned to a meeting of the board of directors to account for the funds (R. 128). When proceedings resumed in open court, the respondent endeavored to lay a foundation to show that appellant had been summoned before the board to account, but no such answers were forthcoming (R. 131) and the matter of the gun was dropped. However, over the objection of the appellant, Howell was permitted to testify regarding purported conversations he had with appellant in which appellant was supposed to have explained a money shortage by saying "We've made some poor deals" and "I've used the money" (R. 132); "I used it to take and pay people off down in California" (R. 133) but no evidence was presented as to what people or for what reasons payment was made.

When the respondent rested the second time, appellant renewed his motion to dismiss, which was denied by the court.

Appellant called only one witness, Attorney George Preston who is the attorney for Wayne Craw, the receiver appointed for Valley Motor Company (R. 156). Preston testified that he recalled having told appellant's attorney that Preston saw a sales slip with a notation on it of the turn-in value of the Budge automobile and $2,000.00 cash and the notation was believed to be in the handwriting of appellant. However, Preston testified that he must have been mistaken when he told appellant's attorney of the notation that Stites had made showing that Budge had paid $2,000.00 cash (R. 157), but that Preston did tell appellant's attorney that he had seen such a notation (R. 158-159).

The instructions were discussed by counsel and the court and exceptions notes. The court instructed the jury with written instructions. Arguments were made to jury and a verdict of guilty was returned.

Appellant filed a motion in arrest of judgment (R. 15) and a motion for a new trial (R. 16) which motions were denied by the court. The motion in arrest of judgment was as follows:

> "Defendant respectfully moves the court to enter an order in arrest of judgment so that no judgment be rendered upon the verdict of guilty, for the reason that the facts proved to not constitute a public offense.
>
> This motion is made pursuant to the provisions of Title 77, Chapter 34, Section 1, Utah Code Annotated, 1953.
> Dated this 23rd day of July, 1955."

The motion for a new trial was as follows:

"Defendant respectfully requests the court for an order granting a new trial in this cause for reasons as follows:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the law.

3. The court erred in admitting the testimony of Clair Lundberg, Wayne Craw and Jay Howell relative to conversations of each witness with the defendant concerning the $2,000.00 which is the subject of the charge.

4. The court should have declared a mistrial and ordered a new trial after Jay Howell testified that the Defendant was the only one armed during the conversation in the upper room of the Valley Motor Co.

5. The court misdirected the jury in the matters of law as excepted to by the defendant in noting exceptions to instructions.

This motion is made pursuant to the provisions of Title 77, Chapter 38, Section 3, Utah Code Annotated, 1953.

Dated this 23 day of July, 1955."

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN FAILING TO SUSTAIN MOTION TO QUASH INFORMATION.

POINT II.

THE COURT ERRED IN DENYING THE MOTIONS OF APPELLANT FOR DISMISSAL AND IN ARREST OF JUDGMENT.

POINT III.

THE COURT ERRED IN DENYING THE MOTION OF APPELLANT TO DECLARE A MISTRIAL AND GRANT A NEW TRIAL UPON TESTIMONY THAT APPELLANT WAS ARMED.

POINT IV.

THE COURT ERRED IN ALLOWING CRAW, HOWELL & LUNDBERG TO TESTIFY CONCERNING CONVERSATION WITH ACCUSED.

POINT V.

THE COURT ERRED IN ADMITTING IN EVIDENCE PLAINTIFF'S EXHIBIT ONE, THE MINUTE BOOK.

POINT VI.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

ARGUMENT

POINT I

THE COURT ERRED IN FAILING TO SUSTAIN MOTION TO QUASH INFORMATION.

The appellant moved to quash the information for the reason that it did not charge the defendant with the commission of an offense (R. 2). The information did not specify any statue which was the basis of the charge, but merely charged the misapplication of money of a corporation as set forth in the statement of facts (Supra p. 2). The Utah Code of Criminal Procedure, 77-21-8, provides as follows:

> "77-21-8. Charging the offense. — (1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:
>
> (a) By using the name given to the offense by the common law or by a statue.
>
> (b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.
>
> (2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such information or indictment regard shall be had to such reference."

The portion of the statute applicable to the instant case is subdivision (b). The definition of the offense of misapplying corporate funds is neither defined by statute nor by common law. Where the statute creating the offense defines

it by use of precise words and designates and specifies particular acts or means whereby the offense may be committed, the language of the statute may be sufficient; but where particular acts or facts are not specified by statute and many things may be done which constitute the offense, it is necessary in charging the offense to set forth particular things or acts charged to have been done with reasonable certainty and distinctness so that the defendant can make his defense and protect himself after judgment against another prosecution for the same offense.

In the case of State v. Jopham, 41 U 39, 123 Pac. 888, Justice Straup, fully discussed this proposition in a lengthy opinion. The defendant was convicted of the crime of pandering and sentenced to a term of eighteen years. The information charged that the defendant "did then and there wilfully, unlawfully and feloniously, by promises and threats, and by divers devices and schemes, cause, induce, persuade and encourage" a particularly named female, "being then and there an inmate of a certain house of prostitution, to remain therein as such inmate; such house of prostitution being then and there known as No. 140 in what is commonly known as the stockade in Salt Lake City."

A demurrer to the information was denied. This court at page 42 stated:

> "The doctrine is fundamental, and, as stated by the Supreme Court of the United States in Rosen v. United States, 161 U.S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606, that "the constitutional right of a defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and after verdict, by motion in arrest of judgment, that the indict-

ment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense;" and by Mr. Justice Sanborn in Floren v. United States, 186 Fed. 961, 108 C.C.A. 577, that:

"'On a motion in arrest of judgment, as well as on a demurrer, it is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific that upon conviction or acquittal thereon it, and the judgment upon it, will constitute a complete defense to a second prosecution of the defendant for the same offense.'"

"It is also elementary and, as stated by the Michigan court in People v. Marion, 28 Mich. 257, approved and quoted by this court in State v. McKenna, 24, Utah, 317, 67 Pac. 815, that, 'as every man is presumed innocent until proved to be guilty, he must be presumed also to be ignorant of what is intended to be proved against him, except as he is informed by the indictment or information.'"

At page 44, this court held:

"The same thought is expressed by Mr. Justice Frick in the case of State v. Swan, 31 Utah, 336, 88 Pac. 12, that,

"'Where an act denounced by the statute is couched in generic terms, the information must go further in stating the offense than be merely using the language of the statute,' and that an information in such language is not sufficient 'in those cases where the acts constituting the offense are nearly as varied as the number of cases in which the charge is made.'"

This court goes on to state in its analysis on pages 46, 47 and 48, that the physical acts claimed to have been done by defendant should be alleged; that

> "Should one assert to another that he had a 'device or scheme' to accomplish a particular result, would that 'in ordinary and concise language enable a person of ordinary understanding to know what was intended' or meant? To enable such a person to know what was intended, would not the first question necessarily be, 'What is the device or scheme?'; that
>
> "When the defendant was charged that she had 'by divers devices and schemes' accomplish a particular result, who but the pleader knew what was intended or expected to be proved against her in such respect? Or, if it should be claimed that she by 'threats' had accomplished such result, again, who but the pleader could know with reasonable certainty what menacing act or conduct of hurt or fear or threatening menace to inflict pain or punishment or injury to person, reputation or property, or to restrain freedom of action, was intended or expected to be proved? Should one complain of another that he 'threatened' him, would not again the first question necessarily be, in order to 'enable a person of common understanding to know' what was meant or intended, 'What did he say or do?' And, if it should be claimed that the defendant by 'promises' had accomplished such result, again, could any one but the pleader know with reasonable certainty just what particular acts or conduct in that regard was intended or expected to be proved?"; that
>
> "As the accused 'must be presumed ignorant of what is intended to be proved against him except as he is informed by the information or indictment,' it is essential that the information or indictment, not

the evidence, apprise him with reasonable certainty what is intended or expected to be proved, and what he is required to meet and defend. And, as repeatedly stated by the courts, the acts constituting the offense, and the particular circumstances of the offense, when they are necessary to constitute a complete offense, are required to be stated in the information, so that the court may determine whether the acts and conduct complained of constitute a violation of statute. It surely cannot be contended that the determination of such a question is alone for the jury, and that it is at liberty to regard anything a promise, anything a threat, anything a device, anything a scheme. Should one either in a civil or criminal pleading charge another at a specified time and place 'with having cheated and defrauded' him, without alleging the acts, the conduct, the facts constituting the cheat or fraud, certainly no one would contend that to be a sufficient pleading to withstand a demurrer. What more has been done here? The pleader has stated his conclusion that the defendant has said or done something, that she has been guilty of some kind of conduct, or committed acts of some kind, which in his opinion amount to a promise or a threat or a device or a scheme, but withheld from the court and the defendant a statement of any acts committed, or things said or done, by her, or any facts or circumstances from which it may be determined whether in law a promise or threat was made, or a device or scheme used or employed, by her. The acts and conduct of the defendant, and the facts and circumstances constituting the promise, the threat, the device, the scheme, were required to be alleged in the information, so that the court could judge whether the accused should have been put upon trial, and that she might then know what she was to defend against."

The court cites the following cases:

United States v. Hess, 124 U.S. 483, 8 Sup. Ct. 571:

> "In the United States v. Hess, supra, and in the federal cases just cited, it was held that an indictment based on and in the language of the statute directed against 'devising or intending to devise any scheme or artifice to defraud,' to be affected by communication through the post office, must not only allege that the person did devise a scheme or artifice to defraud, but it must be set out clearly and distinctly what that artifice was, wherein the fraud consisted, the facts and circumstances by which it was to be accomplished, the facts which constitute the specific scheme or artifice so devised by the defendant, and that this must be done, not inferentially, but by direct and positive averments."

People v. Neil, 91 Cal 465, 27 Pac 763:

> "In People v. Neil, supra, it was held that an information charging that the defendant 'fraudulently voted at an election when he was not entitled to vote,' though in the language of the statute, is not sufficient to state an offense, but must set forth the facts relied on to show fraudulent voting and the particular fact or facts showing that the defendant was not entitled to vote."

State v. Farmer, 104 N.C. 887, 10 SE 563:

> "In State v. Farmer, supra, it was held that an indictment against a physician, in the language of the statute for giving a false and fraudulent prescription for liquors, must set out not only that the prescription was either false or fraudulent, but also the facts and particulars constituting the falsity or fraud."

The court held further at page 54 that an information wanting in any essentials connot be helped by the evidence or verdict.

The conclusion arrived at by this court was as follows:

> "The conclusion reached holding the information defective in the particulars stated not only works a reversal of the judgment but a discharge of the defendant. We have a statute (C.L. 1907, section 4694) which provides that 'an information may be amended in matter of substance or form at any time before the defendant pleads, without leave of court. The information may be amended at any time thereafter and on the trial as to all matters of form, at the discretion of the court, where the same can be done without leave of court. The information may be amended at any time thereafter and on the trial as to all matters of form, at the discretion of the court, where the same can be done without prejudice to the rights of the defendant.' An amendment supplying proper allegations and curing the defects of this information is matter of substance, not form. The particular defects were, before plea, specifically pointed out by the special demurrer. The undoubted right to amend the information in respect to the particulars wherein it is defective then existed. Instead of amending it, when an amendment was permissible, the hazard of a trial and a conviction on a bad information was taken. The right to now amend is lost. The statute, whether wisely or unwisely, forbids it.
>
> The order therefore is that the judgment of the court below be reversed, and the case remanded to the district court, with directions to discharge the defendant."

The information in the instant case in no way specified the acts by which it was claimed the appellant "wilfully, unlawfully and feloniously" misapplied the money of the corporation. There is no allegation as to what, in fact, the appellant did with the money; what he should have done with

it; what authority or direction required appellant to apply money and if so in what way and to what purpose. The appellant had no way of knowing whether by this information he was going to have to prove a complete accounting between himself and the corporation, creditors of the corporation and others; whether it was claimed to be improper for appellant to have a personal account with the corporation; whether it was improper to comingle funds of his own with the corporation; whether it was improper to make payments and dealings from his own account for corporate purposes; whether his acts were fraudulent as to stockholders or creditors, and if so, what acts were fraudulent and in what particulars was anyone defrauded. There is no allegation of what section or sections of the statute prohibit any of the acts claimed to have been done by appellant.

In the case of State v. Spencer 101 U 274, 117 P 2d 455, denying hearing 101 U 287, 121 P 2d 912, the information accused the defendant

> "of the crime of Perjury, committed as follows, to wit: That the said Sid K. Spencer, on the 31st day of May, A.D., 1939, at the County of Salt Lake, State of Utah, committed perjury, by testifying as follows:
>
> "'I have not driven a car at any time since my license was revoked for drunken driving' contrary to the provisions of the statute. * * *"

This court held that the information did not charge a crime under the requirements of subdivision (b) of 77-21-8, and remanded the cause for dismissal, since there had been no specification of the degree of perjury nor any particulars specifying the degree; nor does a bill of particulars supply any defect in an information.

The ruling of this court in State v. Jopham (supra) was quoted and followed by the Supreme Court of Idaho in State v. Groseclose, 171 P2d 863 (1946) wherein they held a charge permitting cattle at large in the words of the statute, "without proper care and attention" was insufficient without additional averments clearly setting forth all of the elements and acts which constituted the crime charged.

It would seem that the requirements of alleging fraud and misapplication in criminal cases would be even greater than that required in civil cases which requires that in all averments of fraud the circumstances constituting fraud shall be stated with particularity (Rule 9 (b) Utah Rules of Civil Procedure). Especially should this be true since neither criminal fraud nor misapplication are defined by statute.

The United States Supreme Court in the case of United States v. James H. Britton, 107 U.S. 655, 27 L. Ed 520, Sup. Ct. 512, where a bank president was charged with over 100 counts in connection with his use of bank funds, the court in holding the counts relative to misapplication of corporate funds insufficient stated:

> "We think the willful misapplication made an offense by this statute means, a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion to his own use or the use of some one else, of the moneys and funds of the association by the party charged. This essential element of the offense is not averred in the counts under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any

other person, of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of the funds.

If we hold these counts to be good, then every official act of an officer, clerk or agent of a bank association, by which its funds are applied in a way not authorized by law, would be punishable under section 5209."

"The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the words 'embezzle,' as used in the statutes, or the words 'steal, take and carry away,' as used in common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'willfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one. These everments the pleader has in these counts attempted to make by charging that the defendant paid out the funds of the association in the purchase of its own stock. But this is not, necessarily, an unlawful use of the funds of the association. It is not every purchase of its own shares by an association that is forbidden."

POINT II

THE COURT ERRED IN DENYING THE MOTIONS OF APPELLANT FOR DISMISSAL AND IN ARREST OF JUDGMENT.

The appellant moved for dismissal of the information at the close of the respondent's case (R. 121) and again when

the respondent rested after being permitted to reopen its case. Appellant also moved the court to arrest judgment (R. 15). Since these motions concern the sufficiency of the evidence to prove the commission of a public offense, they will be considered together at this point.

To sustain a conviction for misapplication of corporate funds requires proof of unauthorized, unlawful acts performed with fraudulent intent to defraud corporate stockholders. The case of UNITED STATES v. Matot, 146 F2d 197 (1944) in construing 12 USCA Section 592 which is similar to 76-13-5, Utah Code Annotated, 1953, held that the words "wilfully misapplies" requires a proof of fraudulent intent, stating:

> "We read the words 'with intent in any case to injure or defraud such Federal Reserve Bank' as limiting all of Section 592 that goes before; that is, as not confined to making false entries. Perhaps that construction is unnecessary, for 'wilful misapplication' of money presupposes fraudulent intent, as does 'embezzlement'; and although 'abstraction' standing alone might perhaps be read otherwise, the context forbids. Indeed, the prosecution itself concedes that it was obliged to prove fraudulent intent."

The only Utah case on corporate frauds found by appellant is that of State v. Pritchett 87 U 104, 34 P2d 704, rehearing 87 U 109, 48 P2d 451, where the office manager of Utah Poultry Producers Co-operative Association was charged with "wilfully, unlawfully, feloniously and fraudulently" misapplying the credit of the corporation, and the only question considered was the sufficiency of the charge upon demurrer thereto. The merits were not considered.

In the instant case the evidence was lacking in many particulars. Proof of misapplication would seem to require the existence of someone in authority over the appellant who could specify the manner of application of the funds and to establish a rule of conduct, the violation of which, would be a misapplication. However as set forth in the statement of facts (Supra 3-4) in considering the background of corporate organization and control, the Valley Motor Company was essentially on "one-man" corporation; there were no directors meetings after business commenced in January, 1954, and none of the directors other than appellant purported to understand, manage or direct the business. There was no proof that Appellant was without authority to establish a personal account with the corporation or to handle the business and funds as he desired. There were many charges being made to the account of appellant in connection with side obligations of the corporation (R. 81) and the account was to be reconciled at the end of the year. There was no attempt by appellant to conceal any of the transactions in that these transactions were recorded in the books and accounts of the corporation. The certified public accountant, John Clay, testified (R. 95) that any capable man could examine the books of Valley Motor Co. and reconstruct the charges against the account of appellant, but in figuring the credits due appellant, he, of course, would not be able to establish the amount of credit due appellant for side obligations paid by appellant (R. 96).

Throughout the entire trial, witnesses for respondent testified that the appellant had never directed that the $2,000.00 in question be charged to appellant's account, until near the end of the trial (R. 154-155) Britzell, the bookeeper reluctantly admitted that Britzell had made a memorandum

about January 10, 1955, to charge appellant for this $2000.00, although Britzell previously (R. 154, line 4) had denied that he ever knew the charge was to be made against appellant's account.

The $2,000.00 check (Plaintiff's Exh. 4) was made payable to the account of appellant. There was no evidence as to why the check was drawn payable to appellant personally, although Dr. Budge did testify that he gave the check in payment for the balance due on the Buick automobile. The check being made payable to appellant, he cannot be said to have misapplied the check by depositing it to his own account. This case resolves itself to a matter of accounting between appellant and the corporation. There is no evidence that an accounting was made nor evidence as to a demand for settlement of an account, nor the time within which an accounting would be required, and if required, who had the authority to require the accounting.

There was no evidence of any fraudulent intent upon the part of appellant in the manner in which he dealt with the $2,000.00. The bookkeeper finally admitted that he was instructed by the appellant to charge the $2,000.00 against account of appellant. Then as to what was done with the $2,000.00 the trial court permitted the three persons, Craw, Howell and Lundberg who were receiving "side payments" from appellant to testify that appellant told these three persons that appellant had used the money to cover another "fictitious deal." However no explanation or proof was offered as to what constituted a fictitious deal or whether the covering of the fictitious deal was for the benefit of the corporation or other persons (R. 104 and 107). These very persons who testified to the "fictitious deal" conversation were receiving corporate money in apparent good conscience

through appellant, as side payments in addition to their regular salary under a gentlemen's agreement (R. 114 and 134) although these three were creditors of the corporation in the sum of $6,000.00 each for capital loans at the outset of business in January, 1954. They all knew that the company was underfinanced.

POINT III

THE COURT ERRED IN DENYING THE MOTION OF APPELLANT TO DECLARE A MISTRIAL AND GRANT A NEW TRIAL UPON TESTIMONY THAT APPELLANT WAS ARMED.

In the statement of facts (ante 11-12) the entire incident which is the subject of Point III is set forth. Clair Lundberg (R. 99-104) and Wayne Craw (109-111) had already testified over objection of appellant to the "fictitious deal" conversation without any mention of weapons. Then the respondent reopened its case and over objection of appellant called Jay, Howell apparently, to further testify concerning this same conversation. The particular questions and answers were (R. 124).

Q Was there any coercion or intimidation on your part?
A None.
Q Was anyone in the room armed?
A Yes.
Q Who was armed?
A Mr. Stites.

At this point appellant objected and moved for mistrial. The court ordered the answer stricken and instructed the jury to disregard it, but denied the motion for mistrial and new trial. In chambers district attorney contended that

he intended to show by the testimony that the appellant couldn't have been intimidated because the appellant was armed (R. 123 to 126), but this question about arms was wholly uncalled for since the immediately previous question and answer were: (R. 123 line 11)

> Q Now in that conversation, did Mr. Stites discuss the matter with you freely and voluntarily?
>
> A He did.

The very foundation questioning negatived the inclination of appellant to use force even if he did have a weapon. The only purpose the question and answer could serve would be that of misleading the jury into the belief that appellant was in possession of the gun with criminal intent. The gun had nothing to do with this charge in any way and the district attorney was unable to lay any foundation which would permit further inquiry into the matter of the possession of the weapon (R. 131) and the matter was dropped. Nevertheless, the harm had already been done.

Nothing further could be done or said about the reason for the weapon being in possession of appellant to erase the matter from the memory of the jurors without risk of incurring even greater prejudice. The court should have ordered a new trial.

POINT IV

THE COURT ERRED IN ALLOWING CRAW, HOWELL & LUNDBERG TO TESTIFY CONCERNING CONVERSATION WITH ACCUSED.

Lundberg (R. 99-104) and Craw (R. 109-111) were permitted to testify that in conversation with appellant on about January 18th or 19th, Lundberg asked "What did you

do with the $2,000.00 from Bob Budge" and the witness were allowed to testify that appellant answered, "I took that to cover another fictitious deal." There was no other evidence of the use of the money by the appellant, so that if that statement about the fictitious deal amounted to a confession, it was not admissible without a foundation being laid to show the same was voluntary and that the accused was fully apprised of his rights. Furthermore since appellant was using money of the corporation through his personal account to make payments on obligations of the corporation and to Craw, Howell & Lundberg by prearrangement with Craw, Howell & Lundberg, then if this use of the money was a misapplication of corporate funds, Craw, Howell & Lundberg are accomplices whose testimony was not corroborated by any other evidence.

POINT V

THE COURT ERRED IN ADMITTING IN EVIDENCE PLAINTIFF'S EXHIBIT ONE, THE MINUTE BOOK.

The facts concerning the introduction of the purported minutes of meeting of the board of directors are set forth in the Statement of Facts, (supra page 4).

A minute book or other record of a corporation must be proved to be authentic or its authenticity conceded before it is admissible as evidence, Fletcher, Cyclopedia Corporations, Vol. 9, Sec. 4622, p. 489).

The original notes taken at the meeting of the board were taken by Attorney Champlin (R. 41) and he subsequently retyped the notes but the same were never again submitted to the Board for approval (R. 42) and were never

signed. Attorney Champlin had prepared the by-laws in advance and some corrections were made, but he did not know where the sheets containing the changes might be, although he did have a copy of the first draft without the changes (R. 50).

The trial court admitted in evidence the minute book "for what it is worth." The jury may well have considered this minute book to be worthy evidence of strict organization and direction of the Board of Directors in its control of the corporation, whereas in fact no such control or direction existed, and the defendant himself was in sole control.

POINT VI

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

The appellant's request for instructions No. 3 and 4 were as follows:

> No. 3. "If you find from the evidence that the defendant was not restricted by the directors or stockholders of the corporation, in handling the funds of the corporation, then the defendant cannot be guilty of misapplying the funds of the corporation, and your verdict should be Not Guilty."
>
> No. 4. "You are instructed that the affairs of a corporation are managed by its directors and officers for the benefit of the stockholders of the corporation. The statute of the State of Utah which prohibits the unlawful misapplication of corporation funds by any director or officer of the corporation was intended to protect the stockholders of the corporation, and if the misapplication of corporate funds by such directors or officer does not defraud the

stockholders, the misapplication of funds is not unlawful."

The court refused to give request No. 3, and modified No. 4 by striking "for the benefit of the stockholders of the corporation" from the first sentence, and by adding "or the creditors, if any," after the word "stockholders" in the last sentence.

There is no statute making misapplication of corporate funds a crime which appears to be for the benefit of creditors. 76-13-5, Utah Code Annotated, 1953, provides:

> ". . . ; and every director . . . who embezzles, abstracts, or wilfully misapplies any of the money, funds or credits of the corporation or association; . . ." is guilty of a felony.

Nothing is stated in the statute which would indicate that the statute was for the benefit of stockholders or creditors or both. The only criminal cases reported in Utah, State v. Pritchett, (Supra 26) did not raise this issue, but that case involved the many stockholders in the Utah Poultry Association. The cases in other jurisdictions, mainly Federal, concern misapplication of funds of banking corporations having many stockholders and depositors.

If the statute were intended for the protection of a creditor of a non-banking corporation, a creditor would then seem to have control over corporate expenditures even to a point of controlling the amounts payable to any other creditor at any stated time. There is no greater need to protect a creditor of a corporation from dissipation of corporate funds than to protect a creditor from dissipation of individual funds; in each case the creditor is assuming the risk that his debtor may expend business capital without paying

the creditor, yet a creditor has no criminal recourse to assist him in the event an individual debtor becomes insolvent irrespective of the reason for the insolvency.

In civil cases the general rule is that a creditor of a corporation has no right to maintain a personal action against directors or officers who by their mismanagement or negligence have committed a wrong against the corporation. The cases annotated in 50 ALR 462 support this proposition. The reasons for the rule are simply stated in Clark v. Lawrence (1856) Brunner, Col. Cas. 637, Fed. Cas. No. 2,827, 50 ALR 463-4, holding the considerations preventing suits by creditors against directors to be as follows:

> "They are: (1) That the directors are the agents of the corporation, and not of the creditors, and there is no legal privity between them. That for misfeasances and nonfeasances in the execution of their agency whereby their principals are injured, agents are responsible only to their principals; and that this rule is as applicable to corporate agents as to agents of natural persons. (2) An injury done to the capital of a corporation is not, in contemplation of law, an injury to each of its creditors. It is true, such injury may prevent the corporation from paying its debts, in whole or in part; and a similar injury to an individual may be followed by the same consequence to his creditors . . ."

No where in the penal statutes of Utah does it specifically appear that misapplication of corporate funds which prevents the corporation from meeting its obligations to creditors is a crime, and a matter so serious as to constitute a felony should not be implied from such an indefinite and uncertain statute especially where such implication extends the criminal responsibility beyond the scope of civil liability.

THE APPELLANT DULY EXCEPTED TO THE FOLLOWING INSTRUCTIONS OF THE COURT:

INSTRUCTION NO. 1. The court had originally drafted No. 1 (R. 9) to read that to find the defendant guilty, it would require proof that defendant did ". . . wilfully, unlawfully, and feloniously misapply money of said corporation in the sum of $2,000.00 . . .." However, during the course of instructing the jury, the court deleted the words unlawfully and feloniously." The information itself charged that the act was done "wilfully, unlawfully and feloniuosly." United States v. Matot, supra 26, holds that the charge of "wilful misapplication" requires proof of fraudulent intent as does embezzlement. United States v. Britton, supra 24, indicates that there must be proof of unlawful application of funds in order to prove "wilfull misapplication."

The trial court merely made an inked line through the words "unlawfully and feloniously" (R. 9) without obliterating these words, thus the jurors in seeing these words could reasonably conclude that there was no necessity of finding an unlawful or felonious act.

INSTRUCTION NO. 5. (R. 10) reads as follows:

> "You are instructed that a corporation is an artificial person created by law, a separate and distinct entity from its individual members or stockholders, and this is true even though all its stock is owned by a single individual."

This may well be a correct statement of law, but its only application to this case is that of convincing the jury that even though appellant owned all of the stock he owed a special duty of faith and protection to a separate entity,

the corporation, and that his responsibility would be the same whether there were one or one hundred stockholders.

INSTRUCTION No. 6. (R. 11) is objectionable for similar reasons advance in connection with the refusal of the court to instruct the jury upon appellants request for instructions No. 3 and 4, in that the court instructed the jury that if the act of the appellant was a fraud upon creditors or stockholders it was an unlawful misapplication of funds.

INSTRUCTION No. 7. (R. 11) was as follows:

> "The word 'misapply' means to use the Valley Motor Company funds in a manner and for a purpose not authorized, to divert funds from rightful purpose to wrongful purpose, and to use them improperly."
>
> "'Wilful' means to do the act by design and evil intent."

Appellant excepted to this instruction (R. 161) for the reason that the instruction failed to show by whom authorization should be given. The trial court later interlineated after the word "authorized," the words "by law" (R. 162). This instruction was still faulty in that no where were the jurors informed as to what use of corporate funds was authorized by law. Instruction No. 7 is further faulty in that either the word "misapply" or the word "wilful" should have been defined to include "unlawful and felonious" action.

NOTATIONS ON MARGIN OF INSTRUCTIONS.

There are some unusual penciled notations on the margin of the instructions (R. 9, 10, and 11). These may have been made by one of the jurors, since I trust they were not made before being presented to the jury, which show the emphasis placed by the jurors upon certain instructions.

Most unusual, however, is the penciled comment (R. 10) with an arrow pointing to instruction No. 4, as follows:

> "No evidence of Vally Motor Corp. being credited for $2,000.00 of Robert Budge Check."

This clearly shows that the jury completely ignored the terstimony of Don Britzell under cross examination (supra 9) (R. 154) wherein Britzell finally admitted that he was told by appellant to charge the appellant for the Robert Budge account.

CONCLUSION

It is respectfully urged that:

The information should have been quashed upon motion of the appellant, and that appellant is entitled to a reversal of the judgment and discharge.

The motions of the appellant to dismiss and in arrest of judgment should have been granted, and that the appellant is entitled to a reversal of judgment and discharge.

The trial court erred in its admission of testimony at trial and in its instructions to the jury for which, if the judgment is not reversed as above requested, the appellant is entitled to a new trial.

The jury misconceived and ignored the evidence as is particularly shown by its penciled notations on the instructions, for which appellant is entitled to a new trial if not released as above requested.

Respectfully submitted,
George K. Fadel
Attorney for Appellant